Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROY H. LUBIT,

Petitioner,

v.

ELANA B. LUBIT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the New York State procedure used to determine contested custody issues in matrimonial litigation is compatible with the Due Process Clause of the United States Constitution.

2. Whether the federal constitutional protections afforded to parents when the state seeks to terminate parental rights for neglect or abuse, as recognized in *Santosky v. Kramer*, 454 U.S. 745 (1982), are applicable to proceedings in which the state, through its court system, seeks to truncate parental rights.

3. Whether New York State's procedures used to determine contested custody issues in matrimonial issues, as applied in the litigation underlying this Petition, violated petitioner's rights to due process under the United States Constitution.

4. Whether New York State's legal standard of a preponderance of the evidence in determining contested custody issues in matrimonial litigation is a sufficiently high standard to meet the due process requirements of the United States Constitution.

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The published opinion of the Supreme Court, Appellate Division, First Department, dated September 24, 2009, is set forth as Appendix A. The unpublished decision and order of the Supreme Court of the County of New York, dated June 15, 2007 is set forth as Appendix B.

STATEMENT OF JURISDICTION

The Court of Appeals of New York denied a timely leave to appeal on January 14, 2010. This Court has jurisdiction under 28 U.S.C. § 1257(a).

INTRODUCTION

This is a Petition for a writ of certiorari to the Appellate Division of New York State. The issues presented here involve New York State's processes used to determine contested custody issues in matrimonial litigation, both as they exist and as they were applied in the case out of which this application arose. While it is true that the there is an exception for domestic relations cases from the normal rules of federal jurisdiction, *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), that exception is not an absolute one. This is not a case in which this Court's review would be barred by the domestic relations exception to federal court jurisdiction. This case does not seek to have this Court determine the ultimate issue of child custody. Instead, it seeks to have the procedures used here examined in light of federal constitutional due process requirements.

In essence, the petitioner is requesting that this Court extend the holdings of *Santosky v. Kramer*, 454 U.S. 745 (1982), and *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2001), which struck down New York statutes concerning termination of parental rights for neglect or abuse, to cover the marked, and generally permanent, truncation of one of the parent's parental rights (almost always the father) which the state needlessly engages in when custody contests occur.

REASONS FOR GRANTING THE PETITION

It is beyond dispute that the relationship between a parent and child is a constitutionally-protected one. As this Court wrote in *Lehr v. Robinson*, 463 U.S. 248, 256 (1983):

> The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases.

Due process, in turn, requires that any attempt by the state to abridge or redefine parental rights be carried out in a process that permits "full and fair adjudication" of the issues involved. *American Airlines v. Block*, 905 F. 2d 12, 14 (2nd Cir. 1990). In the absence of such a process, the federal courts, including this Court, have the power and the duty to require the states to afford those who would be affected by their actions due process protections commensurate with the

importance of the right protected. As will be discussed substantive due process was seriously violated in this case in multiple ways.

Although the decision of a trial court in a child custody case involves the reshaping of a family and the intrusion of the state through its court system into a protected liberty interest, New York sets no objective standards for how its courts are to address these decisions. The sole criterion set is "the best interests of the children", a phrase so vague as to be meaningless, a standard that is pliable to any inclination that the trial judge might feel, but is at the same time opaque to appellate review or any other kind of objective scrutiny, since the trial judge need only recite the formula followed by a series of after-the-fact rationales to justify its determinations.

In a different, but analogous context, this Court has analyzed statutes subjecting behavior to criminal sanctions using the vagueness doctrine. This analysis proceeds from Due Process principles and holds that criminal statutes offend the Constitution when a person of ordinary intelligence cannot take from them fair notice of what is prohibited or are so generalized and formulaic that law enforcement authorities have free reign to decide what is or is not prohibited conduct, a situation that enables, if not encourages, discriminatory conduct. *United States v. Williams*, 553 U.S. 285, 304 (2008). Such laws leave the populace at the mercy of the impulses of the person in charge, rather than subject to objective principles.

The same constitutional defects plague the New York contested custody legal process. There are no objective criteria that any person can find governing the truncation of parental rights in a custody battle. There is nothing that any would-be custodial parent can do or refrain from doing that will bring him or her into conformity with what is expected of such a person. There are no adequate rules or guidelines that appellate courts can apply on a systematic and consistent basis to review trial court determinations of custody. Instead, the custody jurisprudence of New York State is a wilderness of after-the-fact evaluations of conduct and status, arbitrary decisions, and unguided applications of subjective and unarticulated rules by trial courts.

Due process requires more than the recitation of a formula to take away a fundamental right. Due process requires a meaningful hearing in which the role of bias is minimized as well as a considered analysis of the right being addressed and the basis upon which it is sought to be limited or abrogated entirely.

In this case, father's parental rights were substantially, as well as essentially permanently and unnecessarily truncated by the application of vague and unarticulated criteria, through a process that was governed by bias rather than objective assessment of the facts. As will be argued, the system was so poorly constructed that bias was all but inevitable. Although being found to be fit to be the primary parent, Father has now lost all decision-making rights for his children and mother (who had made it clear she wished his time with the children cut to the minimal amount possible) was given the power to bar father from seeing his

children for most of the week and have babysitters care for the children during times when father had traditionally taken care of them. The trial process markedly violated substantive due process requirements: bias dominated the decision making process, the standard of proof used to justify violation of parental rights was too low, and there were no established guidelines on how to behave as a parent in order to retain his joint custody interest and ability to see the children whenever they are not with their mother or in school. Due process demands clarity, avoidance of biased processes, and an appropriate standard of proof, when citizens' liberty is at risk of being taken away by government, whether it is liberty of control over one's behavior as in law enforcement or the liberty interest in parenthood, as in this case.

In intact families our courts do not undermine parental rights to make decisions for children and to spend time with their children when they are not in school, unless the parents have been found to be negligent or abusive. No judge would force parents to place a child with a babysitter, barring the parents from being with the child for part of the week, saying that the babysitter can provide a useful experience for the child. We even let parent's home school their children although there is clear and convincing evidence that almost all children are better off being educated in established institutions with trained teachers and given an opportunity to be with peers and learn socialization skills. We do not require parents to prove that homeschooling is in the best interests of their children. Rather, we only require parents to show they are meeting minimal educational requirements. It is an

anathema to our way of life for the courts to truncate parental rights unless there is an extremely compelling reason such as child abuse.

Judges should not be empowered to curtail parental rights based on their best guess of what is best for the child. Rather, a judge should be required to opine that there is clear and convincing evidence that a situation is seriously harmful to a child before parental rights are avoidably truncated. Moreover, there should be sound scientific reasons for asserting that this is the case. Pet theories and guesses are not an adequate basis to opine that a situation is not good for a child. It takes two psychiatrists opining that someone is a serious danger to himself or others based on mental illness to temporarily force hospitalization. Similarly, when there is no finding of neglect or abuse, no judge should be allowed to truncate parental rights unless two independent forensic evaluators opine that there is clear and convincing evidence that a situation is seriously harmful to a child.

Multiple Supreme Court rulings have underscored the marked importance of parental rights and that state actions limiting them generally require a higher standard than a preponderance of the evidence. Moreover, there is a burden on the state to prove harm is being done, rather than simply saying what is best for the child.

In *Santosky v. Kramer*, 454 U.S. 745 (1982) the United States Supreme Court opined that "The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not

evaporate simply because they have not been model parents." The court also went on to say in this case that it is "plain beyond the need for multiple citation" that a natural parent's "desire for and right to 'the companionship, care, custody, and management of his or her children'" is an interest far more precious than any property. [455 U.S. 745, 759] *Santosky v. Kramer*, 455 U.S. 745 (1982) struck down the NY State statute permitting permanent termination of a parent's interest in the care, custody and management of her child based on "a fair preponderance of the evidence" because it deprives the parent of a fundamental liberty interest without due process of law, in violation of the Fourteenth Amendment to the U.S. Constitution. The rationale was that the risk of error from using a preponderance standard is substantial and that the proceedings are vulnerable to cultural or class bias because they employ imprecise substantive standards that leave determinations open to the subjective values of the judge.

New York State permitting judges to markedly truncate parental rights based upon the judge's assessment of the best interests of the child violates the spirit of *Santosky v. Kramer*, 454 U.S. 745 (1982). Custody decisions which markedly curtail parental rights are also essentially permanent. It is very rare that custody changes. Moreover, time with our young children is particularly precious and once lost it can never be regained. Therefore, the United State's Supreme Court's wisdom in *Santosky v. Kramer*, 454 U.S. 745 (1982) that termination of parental rights requires a higher standard than a mere preponderance of the evidence should apply to custody cases as well as to termination of parental rights. The fact that a parent's

parental rights are not being totally terminated in custody decisions does not permit the court to do so without powerful reason. An individual has a right to constitutional protections to a fair trial whether the ultimate punishment is life imprisonment or home confinement for a few months. Any violation of rights, whether permanent or not, whether partial or total, is protected by the Fourteenth Amendments substantive due process guarantees.

In re Winship, 397 U.S. 358, 370 (1970) Harlan, J., (concurring) wrote that Addington (*Addington v. Texas*, 441 U.S. 418 (1979) teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. The U.S. Supreme Court has mandated an intermediate standard of proof — "clear and convincing evidence" — when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money."

Removing children temporarily from a parent's care for alleged abuse only requires a preponderance of the evidence because it would be dangerous to children to set the bar too high before you can step in and protect a child from abuse. Moreover, the action is reversible and in fact the state has a requirement to assist the parent so that their full rights will be returned. In custody cases where no abuse is being alleged, there is no need to keep the bar low because the child is not in serious danger if he or she continues to spend time with

a parent who may not be optimal but is not abusive. Therefore, clear and convincing evidence that it is significantly harmful to the children should be the minimal standard for custody decisions interfering with a parent's right to see the child when the other parent is not with the child and for taking away decision-making rights. Moreover, the burden of proof should be on the state to show that it is harmful to the child when curtailing parental rights. It should not be sufficient for the state (a single judge) to opine that it is simply better for the child.

In New York the bar for removing parental rights in custody cases is even lower than in abuse cases since in abuse cases a judge must opine that the preponderance of the evidence shows abuse to temporarily suspend parental rights while in custody cases the court simply needs to opine that it is better for the child to do so. Moreover, in abuse cases the state acts to help parents to fix whatever problems led to a truncation of their rights. In stark contrast, in custody cases the court makes it extremely difficult to effect a change in the court order and regain rights truncated by the initial order.

The fact that other states and jurisdictions do not truncate parental rights in custody cases as New York State does demonstrates that there is no compelling state interest being protected by New York's practice. Therefore, the practice violates *Nicholson v. Williams*. In *Nicholson v. Williams*, the court held that the state is precluded from any infringement on fundamental rights unless such infringement is narrowly tailored to serve a compelling state interest. *Nicholson v.*

Williams, 203 F.Supp.2d 153 (E.D.N.Y. 2001). Moreover, procedural due process requires the government to abide by certain rules when it intrudes upon fundamental rights. *Nicholson v. Williams*, *supra* 285. In California the almost universal outcome of custody battles is joint custody with an arbitrator, rather than sole custody to one parent. Moreover, equal time sharing is very common in some locations. In addition, a right of first refusal to be with the child whenever the other parent is not available is standard in many locations. Therefore, there is no compelling state interest that permits the New York State to give sole custody to one parent cutting the other parent out of decision-making, and to deny a parent a right of first refusal to be with the children with the custodial parent is busy based simply upon a single judge's assessment of the best interests of the child.

The Supreme Court has also ruled that a higher standard than a preponderance of the evidence is needed to make a determination which would be stigmatizing to an individual. Because I am a forensic child psychiatrist, the appellate court's statement that I am overprotective of the children's physical safety and that this is a serious weakness in my parenting (published online for all to see) is stigmatizing and highly destructive to my career and ability to support my children. As I will describe in greater detail below, it was unfair to opine that I have a serious weakness in my parental judgment in that I am seriously overprotective of my children's safety based on contested allegations of my attitudes on safety when the children were toddlers and infants (years before the custody battle began) given the uncontested testimony

during the trial that I take the children skiing, iceskating, horsebackriding, rock climbing, swimming and to water parks.

The problems in the handling of the case of "*Lubit v. Lubit*" by the state of New York goes beyond using the wrong standard for the marked and essentially permanent truncation of a father's parental rights, and the lack of appropriate guidelines in making such a determination. The Manhattan courts handling of custody issues so violates both the normal rules for trials and what social science theory tells us is necessary for good decision-making that decisions are generally capricious and arbitrary. Substantive due produces is regularly violated. Moreover, there is generally a marked bias for mothers violating equal protection under the law. Mothers almost never get less than 50-50 time, no matter how poor the forensic evaluation was for them. Fathers generally get less than 50-50 time no matter how capable they are as parents.

In the next section I will describe the process in New York and how it violates the requirements for substantive due process such that decisions are generally capricious and arbitrary. I will then show that this occurred in my case. It is necessary to tediously describe many of the issues in my case in order to show that neither the judge's, nor the appellate court's assessments of the facts were based on a reasonable assessment of either the available facts or of the facts in evidence, and that a preexisting opinion about what the final outcome of the case should be led to markedly biased gathering, vetting and interpretation of the available evidence by the forensic evaluator and the

court. This violated substantive due process guarantees. The appellate court then rubber stamped the judge's decision.

New York State Custody Decision Procedures

The right to trial by jury, by jurors screened for bias and protected from potentially biasing information, is crucial to justice. When it comes to family matters, however, decisions are made by judges (who act as both judge and jury) who are neither screened for preexisting bias nor protected from potentially biasing information. In fact, in family court matters judges are regularly exposed to highly biasing material including the opinion of the law guardian and forensic evaluator which are, in turn, based on hearsay, pet theories and their personal like or dislike for one of the parents. Further complicating matters, judges rely heavily on their observation of demeanor to assess the parents' credibility although research clearly shows that this method is totally unreliable. Reliance on demeanor means judges will believe the people who they find more likeable or more sympathetic based on their own personal likes and dislikes and their feelings about their own mother and father. Relying on demeanor, rather than rigorous analysis of the available data, turns custody battles into popularity contests rather than a process that is likely to elucidate what is in the best interests of the children. Altogether, the failure to adhere to precautions against bias which are seen as crucial in criminal and other civil courts, markedly interferes with appropriate and fair weighing of evidence such that outcomes are determined largely by

first impressions, momentum, and charisma, along with the pet theories of the law guardian, forensic evaluator and judge.

A further problem is that judicial decision-making is neither scientifically based nor grounded in objective guidelines created by state legislatures. Rather, a judge who lacks training in child development and who is selected for political reasons rather than his good judgment concerning children's needs, makes decisions based on personal, pet theories. Some judges favor equal time sharing after a divorce while others favor the children being predominantly in one home even if that means replacing parent time with babysitter time. One judge will focus on the child's attachment and parental warmth and patience while another will focus on which parent provides more structure. One judge will want to hear from the children how their two parents treat them and what they wish the time sharing to be, another will refuse to meet with the children. Whose courtroom you are is far more important in determining the outcome of your case than the merits of your position or the current state of scientific knowledge about children.

The combination of a system which allows judges to markedly reduce the role of a parent in a child's life for no reason other than a single judge believes it is more likely than not better for the child, along with the system being so poorly designed that it is very unlikely to be able to reliably determine what is in the child's best interests, is a disaster for our children, for ourselves and for the fundamental tenets of our nation. Markedly deepening the problem, the appellate courts are loathe

to overturn decisions using the excuse that the trial level judge, having watched the demeanor of the parties, knows best (contrary to the findings of scientific research). Moreover, applications for changes in custody based on a change in circumstances (such as the children are doing poorly because the judge got it wrong) go back to the same judge who is loathe to admit he or she got it wrong and is highly motivated to opine that the minority parent is lying and convinced the children to lie.

When people and systems wield great power with the possibility of doing great harm it is crucial that they be as well screened and trained as possible, that they follow the best scientific knowledge available and that there is careful oversight, with those who do a poor job being placed in a different job. Would we allow anyone to practice surgery without training, oversight or risk of sanctions? If not, then why are we allowing judges to engage in parentectomies without these precautions.

The simplest and most powerful solution to most custody battles, and one that is consistent with the current state of scientific knowledge, is to generally divide the time between the parents equally unless one of the parents truly has serious problems parenting, or is unavailable to personally care for the child half of the time. If equal time sharing was the expected conclusion of custody battles unless one parent is unfit or unavailable, there would be far fewer battles. This would not only save immense resources now squandered by parents and the courts, but it would serve to avoid the polarization and amplification of struggles which now occurs.

If this solution is not accepted then there at least needs to be appropriate training and selection of judges, an end to the use of pet theories and speculation, changes in the system so that judges are not subjected to biasing information, real oversight by the appellate division, and clearer guidelines on evidentiary issues and on how to weigh various factors.

It is incredibly dangerous to have a system that can interfere in our relationships with our children based on the court's impression of the best interests of the child when the system is not designed to have a reasonable chance of coming to a determination of what is in the child's best interests.

Case of *Lubit v. Lubit*

I apologize for the tedious review of the case which follows. It is critical, however, that I provide it in order to show that substantive due process was violated and that decisions on the facts were pretextual and governed by the bias which entered the process as a result of the absence of safeguards which exist in criminal and non family court civil cases.

Elana Lubit and Roy Lubit ("the parties") were married on September 8, 1996 in Maryland. During the course of their marriage, they had three daughters: Rina, born November 6, 1998; Talya, born May 31, 2000; and Lia born June 13, 2002. Plaintiff Elana Lubit (hereafter "Plaintiff" or "Mother") commenced this action for divorce in September, 2004 against Defendant Roy Lubit (hereafter "Defendant" or "Father"). Testimony was uncontested that at the time litigation

began father was the primary hands on parent and that father was the only parent who was available to actually be with the children most of the time. Father left his career in academia so that he could himself take care of the children rather than relying on babysitters. He offered 50-50 time visitation to avoid a protracted custody battle. Mother is an anesthesiologist who leaves home three days a week before the children wake up. She demanded to be the primary custodial parent and made serious accusations about father's mental health and fitness as a parent.

A forensic evaluator, Larry Cohen, was appointed. On the eve of trial he finally produced his CV and it was discovered that he had failed to report an important connection he had to mother's lawyer. Moreover, multiple collaterals reported he had markedly misrepresented what they had said to him. The judge ordered a new forensic evaluation be performed and that the new evaluator not read or review Dr. Cohen's report. The judge and law guardian had already read the report and their opinions of the parents and beliefs concerning what the ultimate outcome of the case should be were markedly affected by this. The law guardian, embarrassed by having failed to check the CV showing Dr. Cohen's close connection to mother's lawyer, and wanting to show that it had not caused a real problem in the report produced, successfully pressed for the appointment of a forensic evaluator known to be extremely pro mother, although father's lawyer vigorously opposed the appointment of this particular evaluator.

The new forensic evaluator, Dr. Kaplan, opined that both parents were fit to render custody. He rejected mother's attacks on father that he was severely mentally ill and insidiously destructive to the children. Dr. Kaplan also said that it was not important whether the time sharing was 50-50 or 40-60 or 60-40. Dr. Kaplan opined that the children were doing well under the current 50-50 time sharing arrangement. Nevertheless, the court chose to markedly truncate father's parental rights.

Overall, Dr. Kaplan's report was markedly biased in mother's favor in that it covered over problems in mother's psychological testing and behavior that should have led to a conclusion that father was the stronger parent. For example, Dr. Kaplan said that the psychological testing done by Dr. Gensler showed mother had good traits for parenting in that she was not narcissistic or paranoid and that father had poor traits for parenting in that he was compulsive. Father's lawyers were only permitted to review the actual report by Dr. Gensler after the trial began and never received the underlying test data which they had requested. Reading of Dr. Gensler's actual report showed that he did not say that father was compulsive, as Dr. Kaplan claimed. Moreover, the psychological testing by Dr. Genssler actual stated that mother was unaware of her own anger, had difficulty with anyone confronting her, had problems with envy and jealousy and could easily imagine taking revenge if she did not get what she wanted, had a snide attitude toward men, was overconfident to the point of being mildly self centered although it did not seem to rise to the level of narcissism, and that mother acted as

if she were entitled to determine the boundaries of appropriate behavior and that if someone disagreed with her there would likely be conflict.

There were other very serious problems with the forensic evaluation done by Dr. Kaplan. Dr. Kaplan, although being ordered to neither read nor review Dr. Cohen's report asked the parents about it, was told by mother it highly favored her, and referenced it 23 times when he wrote his report. Dr. Kaplan allowed mother to speak in Hebrew throughout his observation of mother and the children although he does not speak that language. Dr. Kaplan failed to ask the children's therapists key questions about the parents, did not speak to the school teachers (although he spent six months to do his report), and failed to present father with mother's accusations so father could defend himself. He ignored the reports that the youngest child was very upset when she woke up with babysitters at Mother's house and that the oldest child was burdened by having to take care of her younger sisters when they woke up with babysitters instead of a parent. *(Tr 760)* Dr. Kaplan, when explaining a key opinion that father was more intellectual with the children and mother related in a more natural way, got his facts backwards. He testified that Rina said to Mother she liked to float on the Dead Sea, when he observed her with her mother. *(Tr 271)* In his report, however, Dr. Kaplan wrote that Rina stated that it was during his observation of Rina and her father that she said this. The full quote was that Rina's favorite thing was to float in the Dead Sea in her Daddy's arms. It appears that Dr. Kaplan was so taken by mother's false allegations that father was overly intellectual with the children that he could not

remember with whom Rina made her comments. Dr. Kaplan ignored reasons for concern about some of mother's parenting behavior. For example, when directly asked, Dr. Kaplan said that a parent lying and getting into power struggles around eating are very problematic, but he ignored substantial evidence that these were problems for Mother, including emails of mother's that he was shown. *(Tr 201-202)* When shown an email by mother acknowledging that Rina's hand had markedly swollen when mother had tightly tied a sock onto Rina's hand so that she would not suck her thumb, Dr. Kaplan wrote on the email that mother had terrible judgment. This was, however, never presented to the court by Dr. Kaplan. Instead, Dr. Kaplan said father was too critical of mother, which was in stark contradiction to the facts at hand which were that mother said father was unfit, mentally ill and insidiously destructive to the children and that the children's problems were the result of their spending too much time with their father, while father said mother was a fit parent (although at times careless and angry) and he wanted to continue the 50-50 time sharing.

The judge's marked bias for mother, understandable given that she had read two forensic reports favorable to mother before the trial began, was readily apparent. The judge ignored the serious problems with Dr. Kaplan's evaluation and accepted his conclusion that mother was essentially a perfect parent and a better parent than father, and his statement that the children would be better off being primarily in mother's care.

In the judge's decision, issues for which there was solid evidence, and issues which are normally seen as

being very important and which markedly supported father (availability to be with the children, mother incorrectly seeing father as insidiously destructive to the children and wanting to marginalize him, and the psychological testing markedly favoring father) were basically ignored. At the same time, issues which were very unclear, and which are normally seen as very secondary (overprotectiveness of the children's safety) were moved to center stage. Information contradicting the allegations was never even mentioned.

The judge had been so affected before the trial even began by the conclusions of the two forensic reports, that she repeatedly precluded evidence that was critical of mother while letting in all evidence mother presented against father, including the testimony of man who called mother up and volunteered to testify after father filed a law suit against him to have his bill paid. The judge made a number of criticisms of father's parenting while finding no problems with mother's actions. Careful review of the evidence underlying the judge's finding of the facts criticizing father shows that her findings on the facts were neither fair nor reasonable. The judge criticized father for allegedly saying that he would look to the children for guidance on major issues and let them decide whether they would continue in their current school. This is not what father said and not what is in the transcript of his testimony. When the Court asked father if he would make a change in schools because of his child's wishes he said "there are things that a child could tell me that would lead me to seriously consider changing a school," but "They don't make the decision on schools. Elana and I make the decision on schools." *(Tr 1026, 1027)* The judge claimed there was no

indication the children suffered from the use of babysitters. In fact, there was testimony that the children had a very hard time when they woke up with sitters. The judge claimed that father encouraged the children in things he was interested in but fails to explore their interests. The basis was the speculation of the forensic evaluator (who was shown to be totally unreliable) stating that the oldest child was overly intellectual with father in order to please father. As noted above, in trying to describe how he observed the oldest child being less intellectual with mother he got his facts backwards. Another forensic evaluator hearing that the children asked father questions could easily have praised father for stimulating their interest in learning.

Some of the judge's criticizes of father are inconsistent with other criticisms of father. On the one hand the judge said father is only interested in what he cares about and is not interested in the children's wishes. On the other hand she criticized father for saying he would let the children decide things they should not decide.

The judge's statement of fact that father conveyed his negative opinion of mother to the children and professionals, and her failure to criticize mother for doing this, was grossly unfair. The judge criticized father for disparaging mother in front of Rina during a medical visit and cites the medical records as proof. Review of the records, however, shows that this is not what the records state. The judge apparently accepted mother's lawyers' claim concerning what was in the records rather than actually reviewing the record herself. While finding

serious fault with father for criticizing mother, based on a misstatement of what was in the medical record, the judge ignored or blocked evidence of mother being inappropriately critical of father. Father wanted to call a psychologist the oldest child had seen stating that he would testify that mother said terrible things about father. Mother claimed confidentiality and the judge said that it did not matter what mother had said several years earlier, it only matters what mother was saying now. (It is puzzling the judge felt that when judging mother it was only important what mother said now but when judging father she was very concerned about father's alleged overprotectiveness when the children were toddlers and infants, years before the litigation began.) When father's lawyer tried to ask mother about her disparaging father to parents of the children's friends mother claimed the person she was asked about was a personal friend; the judge ruled that mother did not have to say what she said to a personal friend. Mother never denied making negative comment to this person and never denied the person is a parent of the children's friends. The judge did not mention in her judgment that there was sworn testimony by Joel Haggin, father of friends of the children, that mother called him up a couple of days before he was scheduled to testify saying father is crazy and a liar. The forensic evaluator had failed to look into father's reports that mother said terrible things to the children about father and the court ignored father's reports that mother had said horrible things about him to the children.

The judge criticized father for undercutting mother concerning the oldest child's asthma treatment,

accepting mother's statement of an incident, although the medical record clearly contradicted mother's statements and supported father. Most serious of all, the judge criticized father for being overly protective of the children's safety based almost entirely on mother's contested allegations of his having allegedly had excessive safety rules when the children were toddlers and infants years before the litigation began. The judge ignored father's uncontested testimony that in recent years he had taken the children skiing, horseback riding, rock climbing, swimming, supported their being in gymnastics and took them to giant water parks.

Claiming father caused the oldest child to suffer from anxiety, the judge both misquoted the forensic and ignored key evidence that the oldest child suffers from anxiety when with her mother, not when with her father. Specifically, mother noted that the oldest child had gone to the ER on five occasions for symptoms with no organic pathology found. All five visits occurred from mother's house.

The judge's bias was also evident in a statement she made in chambers that father must have been a bastard for mother to hate him so much.

Finally, even if the judge had been correct in her fact finding, it makes little sense to take children who are doing well with a 50-50 time division away from a fit parent and place them with babysitters when the forensic evaluator said it did not really matter if the children were 50-50, 40-60 or 60-40. The judge followed the forensic's suggestion that the children would be

better off primarily in one house since the parents had different parenting styles since this allegedly created confusion for them. However, doing this replaced father time with babysitter time thereby increasing the number of caretakers the children had. The judge's imposed cure actually made the problem worse.

Father appealed. The appellate division rejected father's appeal. The appellate court's statements, however, showed that they served as a rubber stamp for the judge rather than actually reviewing the material. Essentially every statement they made was completely unsupported by the evidence. The appellate division claimed mother was the primary parent when the custody battle began. No one had said that, it was contrary to the evidence presented, and it was not what the judge had even said. The judge had said mother was the primary parent until a year before problems began. The difference is important since the standard is who is the primary parent when litigation begins. The appellate court changed the facts to fit what the law required rather than applying the facts to the law. In reality, father had always been the primary hands on parent as was readily apparent given the parents' work schedules. The court claimed father had caused the children to go back and forth between the houses on a daily basis for months and therefore had poor judgment. No one testified this happened and it never happened. The court said that father had serious weaknesses in parenting in that he was overly protective of the children's physical safety. In doing this it accepted the judge's focus on issues of soy versus peanut butter and the use of forks by toddlers, and discussion about whether the mattress should be on the ground for an

infant who had repeatedly fallen from the bed, issues that all agreed were from years before the custody battle, and ignored the uncontested testimony that father was currently taking the children skiing, ice skating, horseback riding, rock climbing and swimming. Even if father had been overprotective when the children were toddlers, the evidence was clear that he was no longer overprotective. In response to the crucial issues of mother saying horrible false things about father, clearly seeking to minimize his role in the children's lives and it being established law that parents are better than babysitters the appellate division simply said the "other issues" raised had no merit. The appellate court has repeatedly found such issues to be determinative of custody cases and has overturned lower court decisions when these factors were not taken into consideration. It appears that the appellate court wished to uphold the judge's decision and made findings on the facts to support the predetermined judgment. Leave was asked to appeal to the Court of Appeals and was denied.

Perhaps the most powerful example that the system has not fairly judged the facts and instead is controlled by bias is that when the children began doing very poorly after the schedule changed, when they reported to their lawyer that their mother had threatened them to not talk about problems at her house lest they never see her again, when the oldest child's therapist wrote that the oldest child was suicidal at mother's house and only at mother's house, when the oldest child was hospitalized for suicidality after begging her lawyer for help and being rejected, when a babysitter sent a sworn affidavit stating that the middle child reported being

seriously mistreated at mother's house, the response of the system was that the children's lawyer kept the information to herself for a year and then claimed that all three children were all lying, and the judge refused to meet with the children or to get a new forensic evaluator to look into the situation.

Due process was not afforded in this case. Instead, the petitioner was subjected to a capricious and arbitrary decision making process in which bias, rather than a fair weighing of the evidence, was the key factor in coming to a determination of the facts. The petitioner was subject to a system that used an inappropriate standard in deciding to markedly interfere with his rights to be with his children and to have a say in their management and (more importantly) their right to his presence, protection and guidance. The petitioner was subject to a system which is widely known to markedly favor mothers and therefore violates equal protection under the law. Other states deal very differently, and avoid truncating parental rights. This determination is offensive to the United States Constitution and should be set aside by this Court.

A great deal is at stake in this case, the well-being of three children, whether we live in a system that truly seeks justice as opposed to simply the impression of justice, and the well-being of many other children who have been subject to similar and even worse miscarriages of justice. There is a desperate need for the federal government to protect the substantive due process rights of parents, and in so doing protect the welfare of children.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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